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No. 947

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1968

ZYLPHA S. BUETTNER, MARY ELIZABETH BUETTNER MOORE, PHILLIP BUETTNER, CHARLES BUETTNER, ROBERT BUETTNER and JOHN BUETTNER, Minors, by and through their mother and next friend, Zylpha S. Buettner, *Petitioners*

v.

COMMONWEALTH OF VIRGINIA, *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF APPEALS OF VIRGINIA

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No.

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PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF APPEALS OF VIRGINIA

Zylpha S. Buettner, Mary Elizabeth Buettner Moore and Phillip Buettner, and Charles Buettner, Robert Buettner and John Buettner, Minors, by and through their mother and next friend, Zylpha S. Buettner, your Petitioners, pray that a writ of certiorari issue to review the judgment of the Supreme Court of Appeals of Virginia, entered in the above cause on October 16, 1968.

OPINIONS BELOW

The Order of the Circuit Court of Arlington County, entered January 18, 1968, is unreported, and is printed in Appendix A hereto, *infra*, p. 9. The Opinion of the

Supreme Court of Appeals of Virginia, entered October 16, 1968, is unreported and is printed in Appendix B hereto, *infra*, p. 10.

QUESTION PRESENTED

Whether the State Highway Commission violates the Due Process Clause of the 14th Amendment of the Constitution of the United States by the exercise of eminent domain pursuant to a State statute which grants the Highway Commission the right to take title to private property by the filing of a certificate of deposit in the County Clerk's Office without notice to the private land owner and without the institution of condemnation proceedings.

STATUTES INVOLVED

The following statutory provisions are set forth in Appendix C, *infra*, p. 11: Sections 25-46.8, 33-57.3, 33-70.4, 33-70.11, and 33-75 of the 1950 Code of Virginia.

STATEMENT

Petitioner Zylpha S. Buettner, along with her five children, has for some years made her home at 1011 North Buchanan Street, in Arlington, Virginia. This home is situated on a double lot. The lot on which the house itself sets became her sole property on the death of her husband. The adjoining lot, which is the yard, passed by the laws of intestate possession to Mrs. Buettner and all the children. Two of the children are now grown and emancipated, and three of the children remain with their mother.

The Respondent, through its agent, the State Highway Commission, recorded among the land records of Arlington County, Virginia a certificate of deposit on August 11, 1966 in Deed Book 1630, at page 595. No notice of the filing of this certificate of deposit was served on Petitioners. The recordation of said certificate of deposit purported to divest a defeasible title in the Commonwealth of Virginia to Lots 5A and 5B. This constituted the lot upon which stood the house of the widow Buettner. No proceedings to

condemn land were instituted. The Commonwealth had acquired the land immediately adjacent to Petitioners' land to secure residential homes for the purpose of permitting selected employees of the Commonwealth of Virginia and their families to have homes in which to live free of charge.

One month short of a year later—to wit, on July 12, 1967—the Commonwealth of Virginia filed a second certificate of deposit (a certificate that was dated August 18, 1966) in the land records of Arlington County, in Deed Book 1651, at page 313, the recordation of which purported to vest a defeasible title in the Commonwealth of Lot 6, being the yard of the house.

Still no notice of the filing of this certificate was served upon or sent to Petitioners, and no condemnation proceedings were instituted. On the 21st day of November, 1967 Petitioners filed their Bill of Complaint to quiet title to the land and remove the cloud upon their title that said certificates created. Thereafter the Respondent filed its motion to dismiss and at the same time filed condemnation petitions on both lots on the 11th day of December, 1967, based upon a claim of title dating back to the filing of each certificate of deposit. The trial court granted the motion to dismiss, and timely petition for appeal to the Supreme Court of Appeals of Virginia was denied by that Court.

REASONS FOR GRANTING THE WRIT

The State of Virginia, pursuant to Section 33-70.4 of the Code of Virginia, has created for the convenience of the State Highway Commission a streamlined form for the exercise of eminent domain, which form provides that the Highway Commission may file a certificate of deposit in the land records of the County where the property is located, whereupon the Commonwealth of Virginia immediately becomes vested with a defeasible title in the land. The private land owner receives no notice and no condemnation proceedings are required.

The land owner, without notice of the taking of his land, is given but limited rights to petition the Circuit Court a year later to secure permission to determine adequate consideration under certain conditions (Section 33-75 of the Code of Virginia). This streamlined procedure is made available only to the State Highway Commission, which is exempt by reason of Section 33-57.3 of the Code of Virginia from utilizing the requirements of Title 25 of the Code of Virginia, and particularly Section 25-46.8 which requires a hearing by the Court before the Commonwealth can enter upon private land prior to a condemnation trial.

The so-called streamlined procedure—to wit, the utilization of a certificate of deposit by the State Highway Commission, which gives no notice to the land owner that he has lost his land to the State—violates the Due Process Clause of the 14th Amendment of the Constitution of the United States.

This is the federal question in this case, which question was duly presented in the State court in the original Bill of Complaint to quiet title to land filed in the Circuit Court of Arlington County, and to the Supreme Court of Appeals of Virginia which by its denial of the petition for appeal ruled that the decree of the trial court was plainly right.

In *Bragg v. Weaver* (1919), 251 U.S. 57, this Court held, in affirming a decree of the Circuit Court of Lunenberg County, Virginia, refusing to enjoin a trespass by the Virginia Highway Commission against the taking of earth from appellant's land to be used in the repair of a road, as follows:

> "Where the intended use is public, the necessity and expediency of the taking may be determined by such agency and in such mode as the state may designate. They are legislative questions, no matter who may be charged with their decision, and a hearing thereon is not essential to due process in the sense of the 14th Amendment. (Citations omitted.)

> "But it is essential to due process that the mode of determining the compensation be such as to afford the owner an opportunity to be heard. Among several admissible modes is that of causing the amount to be assessed by viewers, subject to an appeal to a court, carrying with it a right to have the matter determined upon a full trial."

And more recently this Court has ruled that the Due Process Clause requires that an owner whose property is taken by a State must be given a hearing in determining just compensation, and that the right to have such a hearing is meaningless without a provision to give the owner notice of the taking. The case referred to is *Walker v. Hutchinson* (1956), 352 U.S. 112, in which opinion Mr. Justice Black stated:

> "It cannot be disputed that due process requires that an owner whose property is taken for public use must be given a hearing in determining just compensation. The right to a hearing is meaningless without notice. In Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 70 S.Ct. 652, 94 L.Ed. 865, we gave thorough consideration to the problem of adequate notice under the Due Process Clause. That case establishes the rule that, if feasible, notice must be reasonably calculated to inform parties of proceedings which may directly and adversely affect their legally protected interests. . . . ."

The significant part of the State of Virginia's streamlined condemnation procedure (Section 33-70.4), which renders it contrary to the Due Process Clause of the 14th Amendment, is the absence of the requirement of notice or of any manner of court proceeding. The courts of Virginia and this Court have repeatedly held that a governmental agency may take possession of property before the actual hearing on the value. However, in all such cases where this has been permitted, the taking of possession prior to the actual hearing on the value, has been a part of the procedure involved in a court proceeding wherein the land owner was served with notice of the condemnation.

In the case of *Bailey v. Anderson*, 326 U.S. 203, a case that went to the Supreme Court of the United States from the Supreme Court of Virginia, the Supreme Court of the United States stated as follows:

> "[Appellant claimed that] Section 1969j(4) infringes the asserted constitutional immunity by sanctioning Appellee's entry upon the land and the alteration of its physical condition in advance of the appointment of the Commissioners and before they could view the land for the purpose of fixing its fair value upon condemnation. But it has long been settled that due process does not require the condemnation of land to be in advance of its occupation by the condemning authority, *provided only that the owner have opportunity, in the course of the condemnation proceedings, to be heard and to offer evidence as to the value of the land taken.*" [italics supplied]

It should be noted that Section 1969j(4) was a section of Mitchie's 1942 Code which, in the 1950 Code of Virginia, became Section 33-70 and which section was repealed by the Acts of 1958 at the time of the enactment of the streamlined procedure of Section 33-70.4.

The Court's attention is directed to the case of *Angle v. Commonwealth* (1959), 396 Pa. 514, 153 A.2d 912, a case arising in Pennsylvania, wherein the filing of a plat by the Highway Department among certain official records was claimed to be a notice of taking to the land owner of certain of his rights. In an opinion written by Justice Musmanno this proceeding was struck down as being unconstitutional, with the Court noting that the rudimentary requirements of due process in eminent domain proceedings is that the land owner shall know that his land is being taken or is about to be taken. The Court also said in that case:

> "Without notice to a land owner that the Commonwealth intends to take his property, the Commonwealth acquires no higher rating than that of an individual trespasser who transgresses on land which does not belong to him."

Similarly, in a case from the Supreme Court of North Carolina, *City of Randleman v. Hinshaw* (1966), 267 N.C. 136, 147 S.E.2d 902, the Court there held—in citing with approval an earlier decision of the same Court:

> "The due process clause is not violated by failure to give the owner of property an opportunity to be heard as to the necessity and extent of appropriating his property to public use; but it is essential to due process that the mode of determining the compensation to be paid for the appropriation be such as to afford the owner an opportunity to be heard."

Section 33-70.4 of the Code of Virginia requires no notice, and has indeed streamlined away all of the Petitioners' rights as guaranteed by the Due Process Clause of the 14th Amendment of the Constitution of the United States.

The question presented here, although a simple one, is of great importance—not only to the Petitioners, but to all land owners in the Commonwealth of Virginia who stand the possibility of having their land taken by the State Highway Commission without notice to them, and without the ordinary procedures of a judicial condemnation proceeding. The question of the Constitutionality of the streamlined procedure of the use of the certificate of deposit goes to the very heart of the State's exercise of its right of eminent domain, the manner of which has always been within the unlimited discretion of the State Legislature so long as the private land owner's Constitutional rights are protected by the procedure, thus making it essential that this Court now determine whether the certificate of deposit procedure does meet the Constitutional requirement of Due Process.

CONCLUSION

To protect the Petitioners and all land owners in the Commonwealth of Virginia from the taking of their land by the State Highway Commission by the filing of a certificate of deposit in the land records, without notice to the land owner and without a judicial condemnation proceeding, the petition for a writ of certiorari should be granted.

Respectfully submitted,

MARK P. FRIEDLANDER
MARK P. FRIEDLANDER, JR.
BLAINE P. FRIEDLANDER
HARRY P. FRIEDLANDER
Attorneys for Petitioners

APPENDIX A

VIRGINIA:

IN THE CIRCUIT COURT OF ARLINGTON COUNTY

ZYLPHA S. BUETTNER, et al.,
Plaintiffs

v.

IN CHANCERY
NO. 17962

COMMONWEALTH OF VIRGINIA,
Defendants

ORDER

This matter came on to be heard upon the Defendant's Motion to Dismiss the Bill of Complaint and upon the Defendant's Motion to quash the taking of the depositions filed herein; and

IT APPEARING TO THE COURT after argument of counsel that the Complainant has an adequate remedy at law and this cause should therefore be dismissed; is is therefore

ADJUDGED, ORDERED AND DECREED that this cause be dismissed, but without prejudice as to the right of the Plaintiffs to raise by way of defense, in any other action, the other questions or points raised in the above-captioned cause.

AND THIS DECREE IS FINAL.

AND TO THIS DECISION PLAINTIFFS DULY NOTE THEIR OBJECTION AND EXCEPTION.

ENTERED: 1/18/68

/s/ Paul D. Brown
Judge

PHILLIPS, KENDRICK, GEARHEART
& AYLOR
By: /s/ William B. Moore,
Counsel for Defendant

SEEN AND OBJECTED TO. EXCEPTION NOTED:

FRIEDLANDER & FRIEDLANDER
By: /s/ Mark P. Friedlander, Jr.
Counsel for Plaintiffs

APPENDIX B

VIRGINIA:

In the Supreme Court of Appeals held at the Supreme Court of Appeals Building in the City of Richmond on Wednesday the 16th day of October, 1968.

The petition of Zylpha S. Buettner; Mary Elizabeth Buettner Moore; Phillip Buettner; and Charles Buettner, John Buettner and Robert Buettner, minors, by their mother and next friend, Zylpha S. Buettner, for an appeal from a decree entered by the Circuit Court of Arlington County on the 18th day of January, 1968, in a certain proceeding then therein depending, wherein the said petitioners were plaintiffs and Commonwealth of Virginia was defendant, having been maturely considered and a transcript of the record of the decree aforesaid seen and inspected, the court being of opinion that the said decree is plainly right, doth reject said petition, and refuse said appeal, the effect of which is to affirm the decree of the said circuit court.

A Copy,

Teste:

/s/ H. G. Turner
Clerk

APPENDIX C

1950 CODE OF VIRGINIA

§ 25-46.8. **Right of entry upon property.**—Unless otherwise provided by law, any petitioner may enter upon the property to be condemned at any time after the filing of its petition for condemnation and prior to the determination and deposit of the award of just compensation in the manner provided in this chapter, for the purpose of constructing its works or improvements thereon in the manner proposed by the petitioner if, upon the petitioner's application to do so, the court, after twenty-one days' notice thereof has been served on the owners mutatis mutandis in the same manner as is provided in §§ 25-46.9, 25-46.10, 25-46.11 and 25-46.12, and after a hearing thereon finds (1) that a public necessity or an essential public convenience requires such entry for such purposes, and that an emergency exists justifying such entry, before the time when just compensation can be determined and the amount so determined paid into court, and (2) that the interests of the owners of such property will be adequately protected by the payment into court for the benefit of the owners of the amount of the offer made in accordance with § 25-46.5 and, in the discretion of the court, the giving of a surety bond in an amount and with such surety as the court may determine. Upon such payment and the giving of such bond, if any is required, with surety in the office of the clerk or with the court, conditioned as required by law and to the effect that the petitioner and its surety or sureties are bound to the owners of the property to be taken or damaged to secure to each of them payment of just compensation therefor as finally determined in the condemnation proceedings, the petitioner shall have the right to enter and construct its works or improvements upon or through the property as described in its petition. At any time after such payment into court, a party whose property or interest therein is to be taken or damaged may apply to the court for the withdrawal of his share thereof in the manner provided in § 25-46.30.

At any time during the condemnation proceedings, if it appears necessary so to do in order to protect the owners of the property or estate or interest therein to be condemned and assure unto them the payment of just compensation to which they are entitled, the court may require the petitioner to give a new and additional bond in an amount and with sureties satisfactory to the court.

If the petitioner enters upon the property under this section and does any work thereon, or causes any injury or damage to such property, it shall not thereafter be entitled, without the consent of the owner, to abandon the proceedings for the condemnation thereof, but shall conduct such proceedings with reasonable dispatch to final judgment and the petitioner shall pay to the owner of the property or into court the amount of just compensation as determined in the condemnation proceedings. (Code 1919, § 4362; 1924, p. 60; Code 1950, §§ 25-3, 25-4; 1962, c. 426.)

§ 33-57.3. Limitations in Title 25 not applicable to Commissioner.—The State Highway Commissioner shall not be subject to any limitations in Title 25 of this Code in exercising the power of eminent domain pursuant to this title. (1964, Ex. Sess., c. 23.)

Effective date.—The act inserting this section became effective Dec. 12, 1964.

§ 33-70.4. Recordation of certificates; transfer of title or interest; land situate in two or more counties or cities.—The certificate of the Commissioner shall be recorded in the clerk's office of the court where deeds are recorded. Upon such recordation, the interest or estate of the owner of such property shall terminate and the title to such property or interest or estate of the owner shall be vested in the Commonwealth and such owner shall have such interest or estate in the funds held on deposit by virtue of the certificate as he had in the property taken or damaged, and all liens by deed of trust, judgment or otherwise upon such property or estate or interest shall be transferred to such funds. The title in the Commonwealth shall be defeasible

until the reaching of an agreement between the Commissioner and such owner, as provided in § 33-70.11, or the compensation determined by condemnation proceedings as hereinafter provided.

If the land affected by the certificate aforesaid is situate in two or more counties or cities, the clerk of the court wherein the certificate is recorded, shall certify a copy of such certificate to the clerk of the court of the counties or cities in which any portion of the land lies, who shall record the same in his deed book and index it in the name of the person who had the land before and also in the name of the Commonwealth. (1958, c. 581.)

§ 33-70.11. Agreements as to compensation; petition and order of court thereon; disposition of deposit.—At any time after the recordation of such certificate, but prior to the institution of condemnation proceedings, if the Commissioner and the owner, or owners of the land or interest therein taken or damaged are able to agree as to compensation for the land taken and damages, if any, caused by such taking, the Commissioner shall file with the court a petition so stating, with a copy of the agreement attached. If condemnation proceedings are already pending at the time of reaching such agreement, no such petition shall be required, but the motion for dismissal of such proceedings shall contain an averment that such agreement has been reached. Upon the filing of such a petition, or a motion to dismiss, as herein provided, the court shall thereupon enter an order confirming absolute and indefeasible title to the land or interest therein in the Commonwealth. Such order shall be spread in the current deed book, and reference be made showing the book and page number recordation on the margin of the page where the certificate was spread. Upon entry of such order, the Commissioner and State Treasurer shall be relieved of further obligation by virtue of having filed such certificate of deposit with the court.

If it shall appear from such petition and agreement, or motion to dismiss a pending suit, that no person or persons

other than those executing such agreement are entitled to the fund on deposit, the court shall direct that such fund after payment therefrom of any taxes which may be charged against such land taken, be disbursed and distributed in accordance with the statement or charge in the petition, or motion, among the parties or persons entitled thereto. If it shall appear that a controversy exists as to the persons entitled to such fund, such distribution shall be made in accordance with the provisions of § 33-70.6 of the Code. (1958, c. 581.)

§ 33-75. Remedy of landowners under certain conditions.—Whenever the Commissioner enters upon and takes possession of property under the provisions of §§ 33-70 and 33-74 and has not completed the construction of the highway project after a reasonable time for such purpose has elapsed or has not instituted condemnation proceedings within sixty days after completion of the construction of the highway project, or within one year after he has entered upon and taken possession of the property, whether the construction of the highway project has been completed or not, the property owner may, if no agreement has been made with the Commissioner as to compensation and damage, if any, petition the circuit court of the county in which the greater portion of the property lies, or the judge thereof in vacation, for the appointment of commissioners to determine just compensation for the property taken and damages done, if any. A copy of such petition shall be served upon the Commissioner at least ten days before it is presented to the court, or the judge thereof in vacation and the Commissioner shall file an answer thereto within five days after the petition is so presented. If it be found by the court, or the judge thereof in vacation, that a reasonable time has elapsed for the completion of the construction of the highway project or that sixty days have elapsed since the completion of the construction of the highway project or that more than one year has elapsed since the Commissioner entered upon and took possession of the

property, without condemnation proceedings being instituted and without an agreement having been made between the property owner and the Commissioner as to compensation and damages, if any, commissioners shall be appointed to ascertain the amount of compensation to be paid for the property taken and damages done, if any. The proceedings shall thereafter be governed by the procedure prescribed by §§ 33-59 to 33-67 insofar as the same may be applicable. (1944, p. 584; Michie Suppl. (946, § 1969j(7).)

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v.

COMMONWEALTH OF VIRGINIA, *Respondent*

BRIEF IN OPPOSITION OF PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF APPEALS OF VIRGINIA

PHILLIPS, KENDRICK, GRABEBART & AYLOR

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BRIEF IN OPPOSITION OF PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF APPEALS OF VIRGINIA

JURISDICTION

The respondent suggests that this court lacks jurisdiction, there being no substantial Federal question involved, the trial court's order (Petitioner's Appendix A, Page 9) having reserved to the petitioners the right to raise in any other action, the question raised in the subject proceeding.

QUESTION PRESENTED

The respondent adopts the petitioners question.

STATEMENT OF FACTS

The respondent disagrees somewhat with the petitioners' Statement of Facts and therefore make their own statement as follows:

The Virginia State Highway Commissioner, pursuant to authority vested in him by the Legislature of the Commonwealth of Virginia, filed a certificate in the land records of Arlington County where the land is located. He filed under a procedure that is commonly used and is known as the "quick take" or "streamline method" of condemnation. The certificate gave the State Highway Commissioner's estimate of the fair value of the land taken and stated that this amount would be paid by the State Treasurer pursuant to an order of the Circuit Court of Arlington County. Under the laws of Virginia, defeasible title to the property was vested in the Commonwealth of Virginia; simultaneously, the landowners had the right to draw down the estimated value of the land taken and a right to be heard on the just compensation for the land and improvements taken.

Though the petitioners have alleged that the taking was for the purposes of "securing residential homes for selected employees of the Commonwealth of Virginia for their families to have homes in which to live free of charge", there has been no proof of this and it has been denied by the State Highway Commissioner. Furthermore, it contradicts the certificate of taking which stated, "that the land was necessary for the construction, reconstruction, alteration or maintenance of Route 66," an interstate highway.

Before the State Highway Commissioner filed the required Notice and Petition for the appointment of Commissioners and the setting of a date at which time the petitioners might be heard, the petitioners filed a Bill of Complaint to remove the cloud that they alleged existed on their title because of the certificate of taking.

Notice and a copy of the petition for the appointment of commissioners, the proceeding in which the landowners are provided a hearing on valuation, was served on the petitioners in a separate proceeding.

The lower court then dismissed the Bill of Complaint to Quiet Title, a chancery proceeding, on grounds that the petitioners had an adequate remedy at law. They specifically reserved to the petitioners the right to raise any constitutional questions in the proceeding filed by the State Highway Commissioner (notice and petition for appointment of commissioner).

A petition was then taken to the Supreme Court of Appeals of Virginia for a Writ, which was denied.

ARGUMENT

The procedure that the Commonwealth of Virginia uses in its highway condemnation cases is patterned after the Federal Declaration of Taking Act,[1] and has been approved by this court on several occasions.

Under the Virginia system, first the State Highway Commissioner causes a certificate of taking to be recorded in the land records of the county where the land is located which divests title from the owners, and vests title defeasibly in the State simultaneous with the right of the owner to receive just compensation.[2] The cer-

[1] 40 U.S.C., Sec. 258a.

[2] Code of Va. 1950, as amended, Sec. 33-70.4.

tificate of taking affords advance payment to the owner of the estimated value of the property taken.[3] Prior to the filing of any certificate, it is mandatory that a bona fide, but ineffectual, effort be made to acquire, by purchase, that land sought from the owner.[4] The Virginia Legislature has delegated to the State Highway Commissioner the authority to determine what rights of way are necessary and what lands should be purchased or condemned for highway purposes.[5] The decision of the State Highway Commissioner has been held to be in the nature of the legislative determination, and, as such, no hearing is granted to the owner about whether his property will or will not be taken. This absence of opportunity to object to the taking is the real thrust of the petitioner's objection, more will be said about this later. After the certificate of taking has been filed, notice of the petition for the appointment of commissioners who shall view the property, hear evidence and render an award, shall be given to the owner or owners.[6]

This system of highway condemnation is commonly known as the "quick take" method of condemnation and is similar to the system presently used in all but four states. See *Taylor, "Possession Prior to Final Judgment in California Condemnation Procedure"*, 7 Santa Clara Lawyer 37, 41 (1966).

The essential elements of Virginia's system were in fact approved by this court in the case of *Bailey* v.

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[3] Code of Va. 1950, as amended, Sec. 33-70.6.

[4] Code of Va. 1950, as amended, Sec. 33-59.1.

[5] Code of Va. 1950, as amended, Sec. 33-57.

[6] Code of Va. 1950, as amended, Sec. 33-60.1;
Code of Va. 1950, as amended, Sec. 33-60.3.

Anderson, 326 U.S. 203, 66 S.Ct. 66, 90 L.Ed. 3 (1945), which dealt with the predecessor to the current condemnation statutes in Title 33, Virginia Code Annotated (1950 as amended). In the case of *Bailey* v. *Anderson,* supra, the State Highway Commissioner had entered into the land and commenced with the construction prior to any view and prior to any hearing on the value of the land taken; there was no hearing afforded to the owner on the necessity of taking his property nor any hearing on compensation prior to actually taking possession of the land. The court said at, 66 S.Ct. 66, 67, 326 U.S. 203, 205, ". . . it has long been settled that due process does not require the condemnation of land to be in advance of its occupation by the condemning authority, provided only that the owners have opportunity, in the course of the condemnation proceedings, to be heard and to offer evidence as to the value of the land to be taken." Citing *Bragg* v. *Weaver,* 251 U.S. 57, 62, 40 S.Ct. 62, 64, 64 L.Ed. 135, and cases cited; *Joslyn Mfg. Co.* v. *City of Providence,* 262 U.S. 668, 677, 43 S.Ct. 684, 688, 67 L.Ed. 1167; *State of Georgia* v. *The City of Chattanooga,* 264 U.S. 472, 483, 444 S.Ct. 369, 371, 68 L.Ed. 796.

As set out in *Section 4.10 of Nichols on Eminent Domain,* p. 460, due process in condemnation proceedings has been held to require: "(a) Notice and an apportunity to be heard; (b) Before a competent tribunal; (and) (c) In an orderly proceeding which is, (1) Adopted to the nature of the case, (and) (2) In accord with established rules which do not violate fundamental rights". However, the notice referred to in part (a) does not mean notice of the taking of the land, for it has been repeatedly held in Virginia and elsewhere that the matter of what property shall and will be taken is

not subject to review as this action is of a "legislative nature". See *Prichard* v. *State Highway Commissioner,* 167 Va. 219, 188 S.E. 166; *The State Highway Commissioner* v. *Yorktown Ice Co.,* 152 Va. 559, 147 S.E. 239 and *State Highway Commissioner* v. *Creager,* 128 Va. 203, 105 S.E. 217. It is this lack of notice that the petitioners claim has not been granted, yet they have not cited one case in which any constitutional section or statute has been set aside because of the failure to provide for this legislative type of hearing or notice.

The petitioners did have notice that their land was going to be taken, as a bona fide offer was made to them in an attempt to purchase the property prior to the filing of the certificate. The specific question of notice was dealt with in the case of *Bragg* v. *Weaver,* 251 U.S. 57, 40 S.Ct. 62, 64 Lawyers Ed. 135 (1919). The court said in that case at 40 S.Ct. 62, 63 and 251 U.S. 57, 58, about the same lack of notice and opportunity to be heard that the petitioners claim that the Virginia statutes fail to provide: ". . . where the intended use is public, the necessity and expediency of the taking may be determined by such agency and in mode as the state may designate. They are legislative questions, no matter who may be charged with their decision, and a hearing thereon is not essential to due process in the sense of the Fourteenth Amendment."

Also, in the case of *Rindge Co.* v. *Los Angeles County,* 43 S.Ct. 689, 262 U.S. 700 (1923), the city council had by resolution, determined and found that it would be in the public interest to construct certain highway improvements and, as such, take the land of certain landowners who objected. The landowners argued among other items that there was no public necessity for the taking. Other than the public hearings held incident to the legislative council's action, there was

no opportunity given to the landowner to contest the action of the legislative council. In 43 S.Ct. 684, 693, 262 U.S. 668, 709, the court said: "And so construed this statute is not in conflict with the Fourteenth Amendment, either because it fails to provide for a hearing by the landowners before such resolution as adopted, or otherwise. The necessity for appropriating private property for public use is not a judicial question. This power resides in the Legislature, and may either be exercised by the Legislature or delegated by it to public officers." Also cited by the court in *Rindge Co.* v. *Los Angeles County,* supra, is the decision in the case of *Joslyn Mfg Co.* v. *The City of Providence,* 262, U.S. 668, 43 S.Ct. 684, 67 L.Ed. (1923) which said: ". . . The necessity and expediency of taking property for public use is a legislative and not a judicial question (and) is not opened to discussion. . . . Neither is it any longer open to question in this court that the legislature may confer upon a municipality the authority to determine such necessity for itself. . . . The question is purely political, does not require a hearing, and it is not the subject of judicial inquiry."

The petitioners on page 4 and 5 of their petition, appear to misconstrue and confuse the general condemnation statute with that of the "streamlined method". The petitioners cite Code of Virginia 1950 (as amended) Sec. 25-46.8 (Pet., 4) as requiring a hearing, but that code section is from the general condemnation section and the legislature has provided for different procedures in Title 33 (streamlined provisions) and specifically made the provisions of the general condemnation statute (Title 25) inapplicable.[7] In

[7] Code of Va. 1950 (as amended), Sec. 33-57.3. "The State Highway Commissioner shall not be subject to any limitations in Title 25 of this Code in exercising the power of eminent domain pursuant to this title."

answer to the petitioners allegation that no notice is required, Section 33-60.3 of the Code of Virginia of 1950 (as amended) does exactly what the petitioners request and requires that notice be given to the owner or owners of the intention of the commissioner to appoint commissioners to ascertain what will be a just compensation for the land or interest or estate therein, proposed to be condemned and to award damages, if any, resulting to the adjacent or remaining property of the owner by reason of the taking. This has in fact been done, as indicated in the Statement of Facts by the petitioners. This notice was not given to the petitioners incident to the filing of the certificate, nor was it required to be, but permission is made for the owner to draw down for his own use the estimated value of the property upon his petition.[8] The owner is allowed to file grounds of defense if, however, he chooses not to file an answer, it in no way precludes him from presenting evidence as to the fair market value of any property taken or any damage to the residue. Three cases that the petitioners cite as supporting their case are, *Bragg* v. *Weaver,* supra; *Walker* v. *Hutchinson,* 352 U.S. 112, 77 S.Ct. 200 (1956), and *Bailey* v. *Anderson,* supra. These cases actually uphold as constitutional, the procedure now being used in Virginia.

The one other case that the petitioners cite on the due process question, is *Angle* v. *Commonwealth,* 396 Pa. 514, 153 A.2d 912 (1959), in which the State Highway Commissioner in Pennsylvania filed plans in 1924 showing that a right of way would be ultimately widened to fifty feet; but that widening never occurred. In 1955, Pennsylvania argued that the Statute of Limi-

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[8] Code of Va. 1950 (as amended), Sec. 33-62.1.

tations had run and that a previous taking had already occurred by the mere filing of the plans showing a contemplated widening. The Pennsylvania statutes required that a copy of the right of way plans be filed in the capital of the state as well as in the county where the land is located. The State had failed to file a copy of the plans in the county and the court based its decision on this point saying at 153 A.2d 912, 917, ". . . there is no need to pass upon any possible unconstitutionality (citing the appropriate state statute)."

CONCLUSION

The petitioners cite Section 33-70.4 Code of Virginia 1950 (as amended), as requiring no notice, and charge that this procedure has streamlined away all of the petitioner's rights as guaranteed by the due process clause of the Fourteenth Amendment of the Constitution of the United States. The section, of course, has to be read in conjunction with the other sections of the Code. It does take away from the petitioners the right to legislatively challenge the reasons of the State Highway Commissioner as to the direction that a highway will take, but it retains all of the values inherent in the Constitution for providing due process on determining the just compensation that is due the landowner.

Wherefore, respondent respectfully prays that the Petition for the Writ of Certiorari be denied.

Respectfully submitted,

PHILLIPS, KENDRICK, GEARHEART & AYLOR
By: /s/ WILLIAM B. MOORE
William B. Moore
Attorney for Respondent

CERTIFICATE OF COUNSEL

We hereby certify that on the 14th day of February, 1969, and before filing, four copies of the Brief in Opposition were mailed to opposing counsel, Mark P. Friedlander, Mark P. Friedlander, Jr., Blaine P. Friedlander and Harry P. Friedlander, 2009 North 14th Street, Arlington, Virginia, attorneys for the petitioner.

PHILLIPS, KENDRICK, GEARHEART & AYLOR
By: /s/ WILLIAM B. MOORE
William B. Moore
Attorney for Respondent

APPENDIX A

1950 Code of Virginia

§ 33-57. Power to acquire lands, etc., by purchase, gift or eminent domain; conveyance to municipality after acquisition.—The State Highway Commissioner is hereby vested with the power to aquire by purchase, gift, or power of eminent domain such lands, structures, rights-of-way, franchises, easements and other interest in lands, including lands under water and riparian rights, of any person, association, partnership, corporation, or municipality or political subdivision, deemed to be necessary for the construction, reconstruction, alteration, maintenance and repair of the public highways of the State and for these purposes and all other purposes incidental thereto may condemn property in fee simple and rights-of-way of such width and on such routes and grades and locations as by the Commissioner may be deemed requisite and suitable, including locations for permanent, temporary, continuous, periodical or future use, and rights or easements incidental thereto and lands, quarries, and locations with rights of ingress and egress, containing gravel, clay, sand, stone, rock, timber and any other road materials deemed useful or necessary in carrying out the purposes aforesaid. For the purpose of this article "public highway" means highway, road and street; and when applicable, the term "public highway" also includes bridge, ferry, causeway, landing and wharf.

The Commissioner is authorized to exercise the above power within municipalities on projects which are constructed with State or federal participation, if requested by the municipality concerned. Whenever the Commissioner has acquired property pursuant to a request of the municipality he is authorized to convey the title so acquired to the municipality in accordance with the terms of the agreement between the State and the municipality. The authority for such conveyance shall apply to acquisitions

made by the Commissioner pursuant to previous requests of the municipality as well as any subsequent request.

§ 33-57.3. Limitations in Title 25 not applicable to Commissioner.—The State Highway Commissioner shall not be subject to any limitations in Title 25 of this Code in exercising the power of eminent domain pursuant to this title.

§ 33-59.1. Necessity for attempt to acquire property by purchase.—No proceedings shall be taken to condemn land or other property, nor any interest therein, until a bona fide but ineffectual effort has been made to acquire the same from the owner or owners thereof by purchase, except where consent cannot be obtained because of the incapacity of one or more owners, or one or more of them will not or cannot convey legal title or because such owner, or owners, be unknown or cannot with reasonable diligence be found within this State.

§ 33-60.1. Petition.—The proceedings for such condemnation shall be by petition for the appointment of commissioners to the circuit court of the county, or the court of any city which is vested with jurisdiction of eminent domain proceedings, in which the land, property and rights, or the major portion thereof sought to be acquired is located, or to the judge of such court in vacation. The petition shall set forth with reasonable particularity a description and designation of the interests, rights and property intended to be taken, the name or names of the owners whose property is to be taken or affected, and such other facts, if any, as may be deemed necessary by the Commissioner to give full information to the court and all persons in interest and shall be certified by oath of the Commissioner or by his duly authorized agent or attorney.

§ 33-60.3. Notice to owner or tenant; notice that grounds of defense shall be filed.—Upon or after the filing of the petition as provided for hereinabove, the Commissioner

shall give twenty-one days' notice to the owner or owners or the tenant or tenants of his intention to apply to the court for the appointment of commissioners to ascertain what will be a just compensation for the land or for the interest or estate therein, proposed to be condemned and to award damages, if any, resulting to the adjacent or remaining property of the owner by reason of the taking. The Commissioner may, in his notice provided for herein, also give notice that grounds of defense shall be filed, if the Commissioner be of the opinion that grounds of defense are necessary or desirable.

Such notice shall be served on the owner or owners or the tenant or tenants of the freehold.

§ 33-62.1. Filing of grounds of defense; effect of failure to file.—Within twenty-one days from the service of the notice provided for in § 33-60.3 the owner or owners may file, or if notified so to do by the Commissioner as hereinabove provided, shall file in writing, grounds of defense, such grounds of defense to include valuations of the land and interest to be taken and appraisal of any damages which may result to the residue by reason of the taking.

Should the owner fail to file such grounds of defense as hereinabove provided, such failure shall not preclude the owner from appearing on the date set for the appointment of commissioners nor from presenting evidence as to valuation and damage and to otherwise protect his rights, but such failure shall preclude such owner from any other defense by way of pleas in bar, abatement, or otherwise. Provided, however, for good cause shown, the time for filing such grounds of defense may be extended by the court.

§ 33-67. Payment and vesting of tile.—Upon the return of the report of the commissioners appointed in such proceedings and the confirmation, alteration or modification thereof in the manner provided in this article, the sum so

ascertained by the court as compensation and damages, if any, to the property owners may be paid into court or to the clerk thereof, upon which title to the property and rights condemned shall vest in the Commonwealth of Virginia in fee simple, or to such extent as may be prayed for in the petition, unless such title shall have vested in the Commonwealth pursuant to the provisions of §§ 33-70.1 through 33-70.11 of the Code, and the Commissioner or his agent shall have the right to enter upon the construction upon, or use of, the property and rights condemned as may be authorized by the report.

§ 33-70.4. Recordation of certificates; transfer of title or interest; land situate in two or more counties or cities.— The certificate of the Commissioner shall be recorded in the clerk's office of the court where deeds are recorded. Upon such recordation, the interest or estate of the owner of such property shall terminate and the title to such property or interest or estate of the owner shall be vested in the Commonwealth and such owner shall have such interest or estate in the funds held on deposit by virtue of the certificate as he had in the property taken or damaged, and all liens by deed of trust, judgment or otherwise upon such property or estate or interest shall be transferred to such funds. The title in the Commonwealth shall be defeasible until the reaching of an agreement between the Commissioner and such owner, as provided in § 33-70.11, or the compensation determined by condemnation proceedings as hereinafter provided.

If the land affected by the certificate aforesaid is situate in two or more counties or cities, the clerk of the court wherein the certificate is recorded, shall certify a copy of such certificate to the clerk of the court of the counties or cities in which any portion of the land lies, who shall record the same in his deed book and index it in the name of the person who had the land before and also in the name of the Commonwealth.

§ 33-70.6. Proceedings for distribution of funds; effect of acceptance of payments; evidence as to amount of deposit or certificate.—Any person or persons shown by such certificate to be entitled thereto may petition the court for distribution of all or any part of the funds deposited with the court pursuant to § 33-70.2 or represented by a certificate recorded pursuant to § 33-70.3. A copy of such petition shall be served on the State Highway Commissioner, his deputy or any attorney authorized to accept service with a notice returnable to the court or judge thereof in vacation not less than twenty-one days after such service, to show cause, if any, the said Commissioner can, why such amount should not be distributed in accordance with the prayers of the petition. If the said Commissioner shall not, on or before the return day of the petition, show such cause, and if the record in the proceeding does not disclose any denial or dispute with respect thereto, the court shall enter an order directing the distribution of such amount in accordance with the prayers of the petition; provided, however, that in the case of a nonresident petitioner the court may in its discretion require a bond before ordering the distribution. If funds are not then on deposit with the court but are represented by a certificate pursuant to § 33-70.3, a certified copy of such order shall forthwith be sent to the Commissioner by the clerk. It shall be the duty of the Commissioner to deposit such funds with the court within twenty-one days of the date of such order. Interest at the rate of five per centum shall be payable on such funds for any period in excess of twenty-one days from the date of the order directing the distribution of such funds if the court finds that the Commissioner is responsible for the delay in depositing the funds, and the order of the court directing the distribution shall be amended as shall be necessary to provide for the payment of accrued interest.

If the Commissioner shall show such cause, or if the record in the proceeding disclose any denial or dispute as to the persons entitled to such distribution or to any interest or share therein, the court shall direct such proceedings as are provided by § 33-67.2 for the distribution of awards.

Provided, however, that the acceptance of such payment shall not limit the amount to be allowed by a commission in a condemnation proceeding, nor limit the rights of any party or parties to the proceeding to appeal from any decision therein; nor shall any party to such proceeding be entitled to introduce evidence of any amount deposited with the court or represented by a certificate, nor of any amount which has been accepted by any party entitled thereto pursuant to this section. (1958, c. 581; 1964, c. 487; 1968, c. 232.)